IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1136 OF 2005
WITH
CIVIL APPLICATION NO.1325 OF 2005

Municipal Corporation of Gr.Mumbai. ..Appellant.

V/s.

Mohammed Ramzan Shah. ..Respondent.

Mrs.Geeta Joglekar i/b R.A.Malandkar for Appellant.

Mr.S.S.Lanke for Respondent.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 27, 2006.

P.C. :

1. Heard counsel for the parties. Perused the materials on record.

2. Admit, as arguable question is raised.

3. Mr.Lanke waives notice for respondent.

4. As short question is involved, appeal is heard forthwith by consent.

5. The respondent filed suit before the Bombay City Civil Court being C.C.No.1857 of 2003 for injunction against the appellant from dispossessing

him and or demolishing temporary structure situated at Survey No.34 Hissa No.2, CTS 156(part), Village Dindoshi,Tahsil Borivali, Meera Nagar, General Arunkumar Vaidya Marg, Opposite Gokuldas Police Chowky, Malad(East), Mumbai 400097. In the said suit respondent took out Notice of Motion No.1534 of 2003 for temporary injunction. Mandatory relief is also prayed in the Notice of Motion against the appellant to reconstruct the Plaintiff's structure which can be considered at the time of disposal of the suit. The Court below on analysing the evidence adduced on record has positively found that the respondent has failed to establish the fact that any lawful structure existed on the suit site so as to claim temporary relief as prayed for in the Notice of Motion. In other words, on merits the claim of the respondent has been negatived by the trial court on analysing the document on record. That finding reached by the trial court has not been challenged by the respondent/plaintiff. Going by that finding, as no tangible evidence was produced by the respondent/plaintiff to justify the existence of lawful structure, no relief could have been granted to the respondent/plaintiff. To that extent, the finding reached by the trial court needs no interference.

6. In the present appeal filed by the Corporation, the limited grievance which has been made before this court is that, even though the trial court proceeded to answer the relevant issues on merit against the respondent/plaintiff, proceeded to grant relief in favour of the respondent/plaintiff by restraining the appellant from dispossessing the respondent/plaintiff from the place where the structure of plaintiff exists at Survey No.34, Hissa No.2, CTS No.156(part), Village Dindoshi, Tahsil Borivali, Mira Nagar, General Arunkumar Vaidya Marg, Opp.Gokuldham Police Chowki, Malad(east), Mumbai-400097. This relief has been granted inspite of finding of fact against the respondent/plaintiff that the land in question was owned by Corporation and the respondent/plaintiff failed to produce any document to show that lawful structure was in existence in respect of which he was entitled to seek protection. Nevertheless the relief is granted mainly relying on the letter purportedly issued by the Corporation dated 8th November, 2004 being No.ACPN/369/SR/AEM, which was tendered for the first time by the counsel appearing for the respondent/plaintiff before the trial court during the course of hearing of the Notice of motion. There

was no pleading on record either in the original plaint or in the affidavit in support of the Notice of Motion or for that matter in the rejoinder affidavit to assert the claim which has been accepted by the trial court in paragraph-9 of the impugned Judgment. The trial court has noted that the said letter issued by the Corporation presupposes that the respondent/plaintiff had right to be allotted alternate accommodation, which means that some structure owned and possessed by the respondent came to be demolished by the Corporation. That assumption could have been reached by the trial court only after the respondent/plaintiff was to amend the plaint and place the said letter dated 8th November, 2004 on record in support of the said amended pleadings. That document was tendered across the bar during the hearing of the Notice of Motion. The trial court could not have granted any relief relying on the said letter tendered across the bar in the absence of proper pleadings. It is possible that the Corporation could have explained the situation in which the said letter dated 8th November, 2004 came to be issued. May be that letter has been issued under mistaken belief or for some other valid reason or that is a fabricated document. All these matters could have been put in issue only after pleadings

were amended and appropriate relief claimed by the respondent consistent with the amended pleadings.

7. Suffice it to observe that the relief granted by the trial court in the impugned order passed in the Notice of Motion taken out by the respondent cannot be sustained because it is founded on the document which was tendered across the bar for the first time during the course of hearing of the Notice of Motion. This grievance of the appellant will have to be accepted. On this consideration, the appeal should succeed. The impugned order will have to be set aside.

8. Even while doing so, it is made clear that it will be open to the respondent/plaintiff to amend pleadings and seek appropriate relief, as may be advised after the pleadings are duly amended. The trial court will consider those aspects if put in issue on its own merit in accordance with the law.

9. Appeal as well as civil application disposed of on the above terms.